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IN THE

Supreme Court of the United States

October Term, 1969

No. 1392 123

International Brotherhood of Boilermakers,
Iron Shipbuilders, Blacksmiths, Forgers
And Helpers, AFL–CIO, Petitioner

v.

George W. Hardeman, Respondent

BRIEF OF RESPONDENT IN ANSWER TO PETITION FOR CERTIORARI

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STATEMENT OF THE CASE

Respondent admits the statement of the case as set forth by the petitioner with the following exceptions:

On page 3 of petitioner's brief, petitioner states "The union was improperly failing to refer him to jobs * * *". Respondent points out that Herman Wise had been Business Manager of the local continuously since 1960. ("CAT p. 300") [1] As business agent he was the individual responsible for the function of referring men to jobs (CAT 94,95). Hardeman wanted to talk to Wise about his failure to refer him to work as prescribed by union practice and regulations (CAT 104–110). This is what brought on the altercation referred to in petitioner's statement of facts.

In petitioner's statement of facts, petitioner mentions only that the Executive Council denied the appeal of Mr. Hardeman. The Executive Council's handling of the appeal was not done as a matter of review but consisted of another trial and additional evidence being taken and was therefore a trial de novo (see transcript of hearing before Executive Council).

In addition to petitioner's statement of the case, respondent points out that Hardeman sought work in the trade after losing his card from many sources and was unable to get work as a boilermaker (CAT 120, 121, 120, 131). Hardeman sought work in shops and was turned down for not having a union card (CAT 132) and was not referred out for work even though he went on the out of work list (CAT 134). He could

1. References herein are to Court of Appeals Transcript since respondent only has access to Court of Appeals Transcript and such references are designated CAT.

not go on the out of work list in lodges outside of Alabama without a union card (CAT 13, 100). Therefore he was effectively stopped from pursuing his trade as a boilermaker.

Petitioner in its statement of the case alleges that the District Court ruled that there was no evidence to support the charges (Page 6 petitioner's brief). This is an erroneous statement of the District Court's ruling. The District Court charged the jury that there was no evidence in the transcript to support a finding of guilt under the charges brought under Article 13, Section 1 which carried an automatic expulsion penalty (CAT 430, 431). The Court specifically did not rule on whether or not there was evidence in the transcript to support a finding of guilt under Article 12, Section 1 (CAT 432). The Court ruled that the expulsion was unlawful since it was a general verdict and necessarily found him guilty under both sections and demanded automatic expulsion under Article 13, Section 1 (CAT 432, 433).

REASONS FOR DENYING WRIT

I. THE COURT BELOW APPLIED A STANDARD OF REVIEW CONSISTENT WITH THE INTENT OF CONGRESS AND IDENTICAL WITH THE STANDARD OF REVIEW BY OTHER CIRCUIT COURTS OF APPEAL.

II. AN INTERNATIONAL UNION MAY BE HELD LIABLE FOR DAMAGES IN A SUIT BROUGHT UNDER SECTION 102 ALLEGING WRONGFUL EXPULSION.

II–A. THE ISSUE OF THE LIABILITY OF AN INTERNATIONAL UNION FOR ACTIONS OF A LOCAL WAS NOT RAISED ON APPEAL TO THE FIFTH CIRCUIT COURT OF APPEALS AND THIS COURT CANNOT BE CALLED UPON TO CORRECT A COURT OF APPEALS ON CERTIORARI ON AN ISSUE UPON WHICH IT DID NOT RULE.

III. THE DECISION BELOW IS NOT IN CONFLICT WITH THE PREEMPTION PRINCIPLES ESTABLISHED BY DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS OF APPEAL.

IV. SECTION 102 OF THE LABOR MANAGEMENT REPORTING AND DESCLOSURE ACT DOES AUTHORIZE AN AWARD FOR FUTURE DAMAGES WHEN PROXIMATELY RESULTING FROM WRONGFUL DISCIPLINE.

IV–A. THE ISSUE OF FUTURE DAMAGES WAS NOT RAISED ON APPEAL TO THE FIFTH CIRCUIT COURT OF APPEALS AND THIS COURT CANNOT BE CALLED UPON TO CORRECT A COURT OF APPEALS ON CERTIORARI FOR AN ISSUE UPON WHICH IT DID NOT RULE.

IV–B. PETITIONER DID NOT CONTEND ON APPEAL OR ITS PETITION FOR CERTIORARI THAT THE VERDICT WAS EXCESSIVE.

V. PUNITIVE DAMAGES ARE AVAILABLE IN SUITS AGAINST UNIONS FOR WRONGFUL DISCIPLINE UNDER L.M.R.D.A.

ARGUMENT OF RESPONDENT

I THE COURT BELOW APPLIED A STANDARD OF REVIEW CONSISTENT WITH THE INTENT OF CONGRESS AND IDENTICAL WITH THE STANDARD OF REVIEW BY THE CIRCUIT COURTS OF APPEAL

Petitioner contends in its brief that congress did not intend the courts to review the findings of union tribunals as was done in this case. They argue that the Bill of Rights under LMRDA is purely procedural. This was not the mandate expressed by congress in 29 U.S.C. 411 (5) which states:

(5) "Safeguards against improper disciplinary action – No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been * * * (C) be given a full and fair hearing".

The courts have recognized that the notion of a "full and fair hearing" necessarily includes the principle that there must be some evidence to support a finding of guilt under the charge brought. Petitioner admits that this is the ruling of several circuit courts of appeal and supplies citations. Petitioner does not contend that any Circuit Court of Appeals has held that a court cannot examine the records of a union tribunal and set aside a finding on the basis of no evidence to support its finding and further admits that the "some evidence" rule is in keeping with the mandate of a fair hearing.

However petitioner does argue that in this case the Fifth Circuit departed from this rule and that there was evidence to support the charges. This is in keeping with petitioner's erroneous statement of the case in saying that the District

Court found that there was no evidence to support these charges. However, the District Court ruled that there was no evidence to support a finding of guilt under Article XIII, Section 1, of the Subordinate Lodge Constitution and declined to rule on whether or not there was some evidence to support a conviction under Article XII, Section 1, of the Subordinate Lodge By–Laws. The Court further ruled that a general finding of "guilty as charges" necessarily referred to the former section and hence the expulsion was unlawful.

The Fifth Circuit examined Article XIII, Section 1, in International Brotherhood of Boilermakers V. Braswell, 388 F. 2nd 193, Certiorari denied 395 U.S. 835, 20 L. Ed. 854, 88 S. Ct. 1948, since Braswell was tried as a co–defendant of Hardeman under the same charges in the same union trial. They interpreted this article and stated:

"Article XIII, Section 1, of the constitution on its face is directed at threats to the union as an organization and to the effective carrying out of the union's aim. Braswell's fist was not such a threat."

Neither was Hardeman's fist such a threat. It was directed at Wise with a motivation of personal animosity.

An examination of the prohibitions of this article clearly shows that there was no evidence to support a finding of guilt under this charge.

"Any member who endeavors to create dissension among the members * * *".

No other members were involved. Hardeman's attack was directed personally at an individual, Wise.

"* * * or who works against the interest and harmony of the International Brotherhood, or of any district, or subordinate lodge; * * *" This clearly refers to an attack on an organization and Hardeman's attack on an individual is by no means covered here.

"* * * who advocates or encourages a division of the funds, or the dissolution of any District or Subordinate Lodge from the International Brotherhood; * * *" nothing in this section could refer to a fight.

"* * * who supports or becomes a member of any dual or subversive organization which shall be hostile to the International Brotherhood or to any of its Subordinate Lodges, or which is antagonistic to the principles and purposes of the International Brotherhood * * *" Clearly this refers to organizational activity and not an attack upon an individual.

The purposes of this article was to prohibit a member from trying to destroy a union organization from within. No attack on an officer could be remotely construed as a violation under this article.

Petitioner argues that Hardeman's attack on Wise polarized sentiment in the local and therefore Hardeman was guilty of creating dissension among the members. This argument is ludicrous. If that is the meaning of Article XIII, Section 1, it could be applied to the loser in a closely contested race for a union office since by his running it polarized sentiment between the members for two or more candidates. Such an argument is patiently ridiculous.

Whether there was "some evidence" of guilt under Article XII, Section 1, is therefore irrelevant since the general

verdict of guilty necessarily referred to Article XIII, Section 1, with its automatic expulsion charge. This was the way the District Court ruled.

However to go further, as the Court of Appeals did in Braswell, Hardeman could not have been guilty under Article XII, Section 1.

"Article XII, Section 1: In addition to the offenses and and penalties set out in the applicable provisions of the International and Subordinate Lodge Constitution, the following offenses and penalties shall be observed in this Subordinate Lodge, and any member who violates same shall, if found guilty after proper hearing as provided herein, be punished as warranted by the offense.

> "(1) It shall be a violation of these By-Laws for any member through the use of force or violence to restrain, coerce or intimidate, or attempt to restrain, coerce or intimidate any official of this International Brotherhood or Subordinate Lodge to *prevent or attempt to prevent* (italics mine) him from properly discharging the duties of his office."

This article refers to use of force to influence the officials future action. Such was not the evidence before the board. Hardeman's attack was made in anger for vengence against Wise's past maltreatment of him as an individual and in failing in the past to properly discharge the duties of his office by running a fair work list.

In Braswell the Fifth Circuit reached its result of an unlawful expulsion by pointing out two deficiencies. It ruled that the District Courts finding of an unlawful expulsion by bringing in a general verdict for both charges was sufficient to make the expulsion unlawful as the District Court

did in this Hardeman case. The Fifth Circuit Court of Appeals went further than the District Court in Braswell and held that:

"Article XII, Section 1, proscribes the use of force or violence where the purpose of such force is to prevent an officer of the union from properly discharging the duties of his office."

Hardeman's attack was not made to prevent anything. As in Braswell it was motivated by anger. Anger and vengence for past maltreatment.

II

AN INTERNATIONAL UNION MAY BE HELD LIABLE FOR DAMAGES IN A SUIT BROUGHT UNDER SECTION 102 ALLEGING WRONGFUL EXPULSION.

The writ of certiorari should not be granted in regard to this issue nor should the issue be considered if the writ was granted, since this issue was not raised before the Court of Appeals. (See Appellant's Brief to Court of Appeals) Certiorari is a review of the actions of a lower court. Petitioner prays for this court to review the ruling of the Fifth Circuit Court of Appeals. This issue was not raised before the Fifth Circuit and they were not called upon to rule on it, so there is no ruling on this particular issue to be corrected.

Had the issue been properly raised, it would have to be decided adversely to petitioner. The statutory provisions upon which this cause of action is based makes the Inter-

national Union liable. 29 USC 411 (5) creates the safeguards which were violated in this act. When this section required a full and fair hearing it certainly contemplated a full and fair hearing of any appeal.

Section 411, Sub Section (4) has written into it the requirements that a member may be required to exhaust reasonable hearing procedures which contemplated appeals to International bodies. If the International violates the members rights under 29 USC 411 (5) it certainly is liable under 29 USC 412 which states:

> "Any person whose rights secured by the provision of this sub-chapter have been infringed by any violation of this sub-chapter may bring a civil action in a district court of the United States, for such relief (including injunctions) as may be appropriate. * * *"

Therefore the statutory authority makes the International liable.

Petitioner cites a few old New York cases which were not decided under the provisions of L.M.R.D.A. Without the basis of L.M.R.D.A. they do not apply.

However if they did apply, their doctrine would decide this issue adversely with petitioner. This doctrine of nonliability of International Unions was applied in situations where the appellate function was only to review the proceedings below. In the instant case, the International did more than that. They tried respondent de novo. They constituted a board which took evidence, held a hearing and convicted the defendant anew. (See Executive Council's Transcript.) This was not an appellate review. Again, if it had been merely an appellate review rather than trial de

novo, the statutory sections of L.M.R.D.A, Sections 411 and 412 would still apply.

Further the New York doctrine of non-liability applied only in instances of the absence of fraud or bad faith. That did not exist in this case since there was surely bad faith on the part of the Executive's Councils board when they approved respondent's conviction of a charge without evidence to support it.

Again in this case the International had control throughout and could have corrected this gross evil. They perpetuated it and should be held liable even under the New York doctrine which would be in conflict with the statutory mandates of L.M.R.D.A.

III

THE DECISION BELOW IS NOT IN CONFLICT WITH THE PREEMPTION PRINCIPLE ESTABLISHED BY DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS OF APPEAL

Petitioner contends that the decision below is in conflict with other cases. Among them he cites Local 100, United Association of Journeymen and Apprentices V. Borden, 373 US 690. The facts in the Borden case are entirely dissimilar from the facts and cause of action in the Hardeman case before this Court. In Borden, the plaintiff had asked a business agent in Dallas to refer him to a certain job, (the Farwell Job). The contractor on this job had requested the union to send the plaintiff. The business agent refused to send the plaintiff on the Farwell Job, although he was referred to other jobs. Plaintiff brought his suit in the State Court of Texas seeking damages under the state law for the refusal of the business agent to send him out on the

Farwell job. He alleged in his complaint that the action of defendant constituted a wilful, malicious and descriminating interference with his right to contract in pursuit of a lawful occupation and defendants had breached a promise explicit in the membership agreement. i.e. not to discriminate unfairly nor to deny any member the right to work. These are not the facts in the Hardeman case before this court. In the Borden case plaintiff was not disciplined as in the case at bar. Plaintiff was not expelled from his union as in the case at bar. Plaintiff, according to the complaint as filed in the State Court, was a victim of discrimination. These facts being so in the Borden case, it is understandable that the doctrine of preemption should apply in the Borden case. The Borden case is no precedent for determining this issue in the case now before this court.

Petitioner also cites Local 207, International Association of Bridge, Structural and Ornamental Iron Workers Union, et al, V. Jacob Perko, 373 US 708 (1963). The facts in the Perko case are again dissimilar from the facts in the Hardeman case. Plaintiff had instituted his action by filing his complaint in a State Court in Ohio alleging that he had been employed as a foreman by William B. Pollack Company and that defendants had demanded the company to discharge him as a foreman and had thus procured his discharge from his job as a foreman. Since then, defendant's union had prevented him from gaining foreman jobs. There is no expulsion and no disciplinary action taken in the Perko case. The heart of the complaint was again discrimination against the complaint in the type of work that he was doing. This is not so in the Hardeman case. The heart of the Hardeman case is not discrimination but is the fact that Hardeman was expelled from his union unlawfully. Therefore, the Perko case cannot be considered precedent on this issue in the Hardeman case.

The Hardeman holding on the doctrine of preemption is completely in accord with decisions of this Honorable Court In 1958 this Honorable Court decided International Association of Machinist V. Gonzales 356 US 607, 78 S. Ct. 923, 2 L.Ed. 2d. 1018. The Gonzales case was decided before passage of the Landrum–Griffith Act. It was filed in a state court alleging that complainant was expelled from his union in violation of his rights under the Union Constitution and By–Laws. This is the same type of violation alleged in the instant Hardeman case. Plaintiff sought reinstatement and damages in the state court under state law. The case was brought to the Supreme Court of the United States on the issue of preemption as raised here. This court held that the National Labor Relations Board had no jurisdiction in the Gonzales case. It further held that the National Labor Relations Act did not provide for the facts as set out in the Gonzales case and hence would not provide for the facts or the type of complaint in the instant Hardeman case. It can hardly be said now that the National Labor Relations Act preempts the Labor Management Reporting and Disclosure Act in the case at bar. Certainly this court has decided this issue when it ruled on Gonzales.

Petitioner argues that a suit which seeks reinstatement to membership for wrongful expulsion or suspension is not covered by the preemption doctrine but that a suit which seeks damages is. Again, I refer to the Gonzales case where this court held that a suit which sought damages although it sought injunctions too was not preempted by the National Labor Relations Act.

In addition to this, the damages sought are a direct and proximate result of the wrongful expulsion. After the expulsion Hardeman could not find work because he was no longer a union member. The National Labor Relations Act

would not have protected Hardeman by not being a nonunion member.

Also, 29 USC Section 412 creates a statutory right to these damages. The section says:

> "Any person whose rights secured by the provision of this sub-chapter have been infringed by any violation of this sub-chapter may bring a civil action in a District Court of the United States, for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought up in the District Court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located."

Petitioner's argument that since respondent claims loss of wages as resulting damages as a result of his wrongful expulsion it should come under the National Labor Relations Act is in conflict with the plain directive of Section 412. Respondent's claim for loss of wages and fringe benefits as a result of this wrongful expulsion did not cause his action to be preempted by the National Labor Relations Act. The graveman of this case was wrongful expulsion and violation of the Labor Management Reporting and Disclosure Act, and the damages claimed were the resulting damages for the violation of this act, or "***such relief as may be appropriate" as allowed in Section 412.

Respondent also contends that "such relief as may be appropriate" as stated in the act would include any damages by reason of the wrongful discipline which would include any damages including the loss of wages which would be directly or proximately caused by the wrongful discipline

or the wrongful expulsion in this case. Respondent contends that the evidence shows that by reason of his wrongful expulsion the respondent lost wages and suffered his ability to earn an income in his trade. He was effectively barred from practicing in the trade which he had followed all his life. Hence it was a direct and proximate causal relationship between the wrongful expulsion prohibited by the Landrum–Griffith Act and the loss of wages and income, hence the appropriate relief as mentioned in Section 412 under the act.

This court rejected the same argument in International Brotherhood of Boilermakers, et al, V. E. T. Braswell, 388 F. 2d. 193, Certiorari denied 395 US 935, 20 L. Ed. 2d. 854, 88 S. Ct. 1848. The Hardeman case before this court was a companion case to the Braswell case. Both men were disciplined under the same action and for the same incident and the same charges. The respondent in this case, Hardeman, is referred to in the statement of facts in the Braswell Decision by the United States Court of Appeals for the Fifth Circuit on page 194 of the opinion. The Fifth Circuit rejected the Preemption argument in the Braswell case and stated:

> "A clear indication therefore of congressional intent to confer jurisdiction on the Federal District Courts to award damages for actions, even if these actions were arguably violations of the N.L.R.A. – would control." "***even if the conduct is arguably subject to the N.L.R.A. (which is doubtful), it is also a violation of the L.M.R.D.A. A clear congressional directive that Federal Courts have jurisdiction to entertain suits has precedence over application of the primary jurisdiction rule."

This court denied certiorari in the above cited case.

IV

SECTION 102 OF THE LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT DOES AUTHORIZE AN AWARD FOR FUTURE DAMAGES WHEN PROXIMATELY RESULTING FROM WRONGFUL DISCIPLINE

The writ of certiorari should not be granted in regard to this issue nor should the issue be considered if the writ were granted, since this issue was not raised before the Court of Appeals. (See Appellant's Brief to Court of Appeals) The only issues on damages raised in appellant's brief to the Court of Appeals was the question of the availability of punitive damages in such a suit. The only other related issue to damages was appellant's argument that there was not substantial admissible evidence submitted to support the juries verdict. Under the latter issue, the appellant argued that the evidence introduced was illegal and not sufficient to base the verdict on. This attacked the evidence, not damages. Nowhere in appellant's brief did he argue the question of whether or not future damages were available in a Section 102 suit.

Certiorari is a review of the actions of a lower court. Petitioner prays for this court to review the ruling of the Fifth Circuit Court of Appeals. This issue was not raised before the Fifth Circuit and they were not called upon nor given the opportunity to rule on it. There is no ruling to be corrected.

However, had the issue been properly raised it would certainly have to be decided against petitioner. The statutory provisions of L.M.R.D.A. specifically allow an award of future damages. Title 29 USC Section 412 states;

"Any person whose rights secured by the provision of this sub-chapter have been infringed by any violation of this sub-chapter may bring a civil action in a District Court of the United States for such relief (including injunctions) as may be appropriate.***"

The section does not demand that such a suit include an injunction. The parenthetical expression "including injunctions" can be interpreted only as meaning that an injunction could or could not be included in a civil action. If Congress had intended that such suits be limited to injunctions with damages up to the time of injunction the section would have been worded more definitely to that effect, such as "may bring an action for injunctive relief and damages up to the issuance of the injunction".

The evidence in this particular case shows that the petitioner expelled the respondent from its membership and therefore effectively deprived him forever of pursuing his trade. Although respondent sought another trade at forty-three (43) he could not make as much money as he would have made in his chosen trade of a boilermaker. The evidence at the trial effectively showed that the respondent would have gained nothing had he forced the union to reinstate his membership. He would have then been subject to the same discrimination which resulted from the whole affair.

Petitioner argues that the lump sum of damages if invested could produce a substantial annuity for the respondent. This may be true. However petitioner committed the wrongful action against respondent and now let them pay for it. The same argument by the petitioner could apply to a loss of wages by a man disabled by an automobile accident. You could say he suffered a windfall also in that he could live

off the annuity created by his lump sum damage award. However the law clearly permits him to collect his future damages.

Respondent is in the same predicament as a disabled man. When a man is disabled in an automobile accident and because of his disability he is unable to follow his chosen profession and earn a livelihood, the tort feasor is liable to the injured party for all future wages that he will lose. The same is true of respondent herein. He suffered an injury, the loss of his union card resulting in the loss of the ability to follow his chosen profession. The defendant has committed a wrong, a tort, and is therefore a tort feasor which is subject to the right of action created by Section 412. Let them pay for the evil that they have wrought.

Respondent further points out to this Honorable Court that nowhere in appellant's brief to the Fifth Circuit Court of Appeals nor in the petition for certiorari does the petitioner claim that the verdict in this case was excessive. Apparently they realize and conceed that the verdict was realistic and soundly based on the evidence and facts in the case or surely they would have raised this issue.

Petitioner cites several cases in his argument under this sub-section. None of them apply to the case at bar. They include Local 20, Teamsters, Chauffers, Helpers Union, etc. V. Morton, 337 US 52, which concerns a contractor suing a union for damages for a secondary boycott; Lynn V. United Plant Guard Workers, 383 U.S. 53, which is a libel suit by an employer against a union which was seeking to unionize the employer and the Supreme Court of the United States held that the libel action could be brought even though the District Court had dismissed the Complaint as being subject to the N.L.R.A.; Vapor Blast Shop Workers V. Simon, 305 F. 2d. 717, which is a petition for mandamus

against agents of the N.L.R.B. to compel them to seek compliance with a decree of the court enforcing an order of the N.L.R.B.

None of these cases have any bearing on this issue in the particular case before this court.

V

PUNITIVE DAMAGES ARE AVAILABLE IN SUITS AGAINST UNIONS FOR WRONGFUL DISCIPLINE UNDER L.M.R.D.A.

Title 29, Section 411 is the basis of the Hardeman suit. Section 412 gives a right of action for violations of Section 411. The pertinant part of Section 412 is as follows:

> "Any person whose rights secured by the provisions of this sub-chapter have been infringed by any violation of this sub-chapter may bring a civil action in a District Court of the United States for such relief (including injunctions) *as may be appropriate.*" (italics mine)

The above quoted Section 412 does not rule out punitive damages as an element of damages in such a suit brought under the Landrum–Griffith Act. I submit that the question of "relief as may be appropriate" referred to in this sub–chapter also includes punitive damages. On the trial of a case, if it appears that the action of the union was wilful, or wanton, then punitive damages would be appropriate.

The purpose of the act is to protect the rights of union members from undue wrongful discipline. I submit further that protection from wrongful discipline would also imply

punishment for wilful wrongful discipline. I, therefore, submit that under this section, if the evidence warrants, the plaintiff would be entitled to punitive damages in such amount as the jury may assess. Punitive damages would be a deterrent to unions to abuse their members within the meaning of the statute.

The Fifth Circuit Court of Appeals in the Braswell case stated:

> "In the statutory statement of findings and purposes of LMRDA Congress declares that there are instances of unions' "disregard for the rights of individual employees" and that it "is necessary to eliminate or prevent improper practices on the part of labor organizations . . ." 29 U.S.C. Section 401. The awarding of punitive damages in appropriate cases serves as a deterrent to those abuses which Congress sought to prevent."

In the Braswell decision on the point of punitive damages the Fifth Circuit also adopted a statement of the New York Supreme Court, Appellate Division, in Fittapaldi V. Legassie, 18 A.D. 2d. 331, 239 N.Y.S. 2d. 792, which is a strong argument for punitive damages:

> "Strong reasons of policy promote the use of exemplary damages to deter union officials from conduct designed to suppress the rights of members to a fair and democratic hearing on legitimate disciplinary charges. The very basis for the existence of unionism in our society today is the promise of employment to those who desire to associate freely in order to obtain it. The right of the working man to the benefits of collective

> bargaining is too essential and valuable to be hindered, impeded and seriously damaged by irresponsible and dictatorial leaders whose dominance in any given situation does great disservice to the purpose and principles of unionism. When that right of free association is usurped by a concerted, malicious effort to deprive the individual of the safeguards built into the organizations, it cannot be condoned *** Imposition of exemplary damages, when the requisite elements of malice, gross fraud, wanton or wicked conduct, violence or oppression are present, serves to achieve the deterrence they were designed to effect."

The policy of L.M.R.D.A. is to protect union members from wrongful expulsion or other forms of wrongful discipline. It would be unreasonable to say that congress did not intend for the courts to use all in their power to protect union members from this sort of conduct. Respondent submits that to exclude pumitive damages as an element of damage under L.M.R.D.A. would merely lessen the deterrent for unions from wrongfully disciplining their members. The result of this would be more wrongful discipline, and therefore, more useless litigation cluttering up our courts. Surely, this court does not want this result. The court surely wants to prevent this type of action, rather than allow it to continue and force illegally disciplined members into the courts for redress. Respondent submits that punitive damages are necessary in this type of action in order to protect not only the respondent's rights but further to protect the rights of all union members whever they may be.

The classic reason for allowing punitive damages in any suit is the deterrent factor. The doctrine rests upon the theory that allowing punitive damages in a specific type of

suit will discourage the type of wrongful action upon which suits are brought. To rule that punitive damages are not recoverable under the L.M.R.D.A. would be to thwart the intention of congress of protecting the individual laborer in the United States from wrongful discipline by his union.

I further submit to this Honorable Court that when congress passed L.M.R.D.A. it created an action for a tort. Traditionally the type of suit which is considered a tort is one wherein an individual or legal entity has wronged another individual or legal entity which does not arise out of a contract. I submit further, that when congress created this cause of action it had in mind the doctrines that have developed in the common law regarding damages allowed in tort action. The essence of the concept of "tort" is that of a wrongful act. Surely wrongful discipline is a wrongful act. L.M.R.D.A. provides the remedy for such a wrongful act. To hold that punitive damages are not recoverable where malice or wanton indifference is present, is to hold that longstanding principals of tort are excluded under this act; to so hold would make a mockery of the old maxim, "for every wrong there is a remedy." To hold that congress did not intend punitive damages to be an element of damages where wantoness or wilfulness exists is to hold that the greatest law making body on earth is ignorant of the basic fundamentals of common law torts.

Petitioner cites Fulton Lodge No. 2 of International Association of Machinists V. Nix, 415 F. 2d. 212, Fifth Circuit 1969, which petitioner alleges holds that punitive damages do not lie under this section citing Braswell. Such is a broad statement misinterpreting the Nix case. In the last paragraph of the opinion the Fifth Circuit notes that the District Court had reserved the ruling on compensatory damages for later and also noted that the District Court had

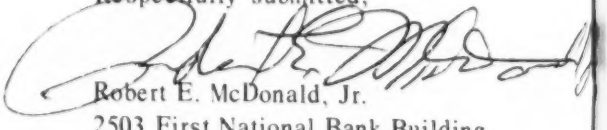
striken the prayer for punitive damages in Nix's action. Their footnote referred to Braswell and approved it as being correct and consistent with the Braswell decision. Apparently the court was referring to the fact that it ruled in Braswell that punitive damages were available when there was wanton, or wilful conduct or malice or gross fraud. The ruling in Braswell did not allow punitive damages in the absence of maliciousness, wantonness or wilfulness or gross fraud. Apparently the Nix case presented none of these elements which the Fifth Circuit ruled in Braswell were requisite to the awarding of punitive damages. There is therefore no conflict between these two decisions.

Before L.M.R.D.A. several states allowed causes of action similar to those of the instant case which were based upon state statutes. In following the deterrent principle many have allowed punitive damages in such actions under the state statutes. See Manning V. Kennedy, 320 Ill. App. 11, 49 N.E. 2d 658; Taxi Cab Drivers Local Union No. 889 V. Pittman, 322 P. 2d 159, 41 LRRM 2045 Harper V. Gribble, 143 Colo. 502, 355 P. 2d. 526, 46 LRRM 2860; St. Louis S. W. Ry Co. of Texas V. Thompson, 113 S. W. 144.

CONCLUSION

For the fact that the rulings of the District Court and Fifth Circuit Court of Appeals are well grounded in the law and not a radical departure from accepted principals of law, the petition for Writ of Certiorari should be denied and appropriate damages under Rule 54 should be assessed against the petitioner together with interest at the rate of six per cent per annum from the date of judgment.

Respectfully submitted,



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Certificate of Service, Alabama, Mobile County

I, Robert E. McDonald, Jr., Counsel for the Respondent, do hereby certify that I have this day served Petitioners attorneys with a true copy of the foregoing brief by mailing to its attorneys a copy thereof by United States Mail in properly stamped and addressed envelope as follows:

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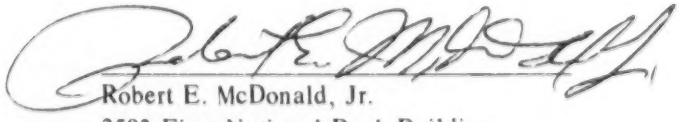

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